In the
United States Court of Appeals
For the Seventh Circuit

No. 96-2552

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE NORTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CR 583—Elaine E. Bucklo, *Judge.*

SUBMITTED JANUARY 31, 1997[1]—DECIDED MARCH 3, 1997

Before COFFEY, MANION, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* In a traditional check kiting scheme, a person artificially inflates a checking account balance during the "float" time that passes when a check moves between two or more banks. Check kiting (assuming the victim is a federally insured financial institution)

[1] This case was scheduled to be orally argued on December 9, 1996. It did not proceed to argument, however, because we granted a motion for a continuance filed by the appellant. Subsequently, after an examination of the briefs and the record, the court has concluded that oral argument is unnecessary; accordingly, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

violates the federal bank fraud statute, 18 U.S.C. § 1344. But can one violate the statute when only one account at one bank is used in the scheme? The answer is "yes."

All Lawrence Norton wanted for Christmas in 1993 was a larger checking account balance. So, on December 23, although he didn't have much money in his account at LaSalle National Bank, Norton, a certified public accountant, wrote himself a check for $19,800. Norton then deposited the check back into his LaSalle account through a second bank's ATM. Norton was no dummy—he realized that by using a non-LaSalle ATM his "deposits" would be credited to his account within 24 hours, but the check wouldn't be presented to LaSalle for payment until a few days later. As a result, his account would reflect an artificially high balance during the intervening "float" period. In order to use the float to obtain cash advances and write checks to third parties, however, Norton had to keep his "kite" in the air. That is, he needed to repeat his original transaction over and over again to avoid detection and prolong his use of the inflated balance. That's exactly what he did, writing 79 checks (totaling over $1.3 million) to himself by March 29, 1995. During that time Norton wrote checks to third parties and withdrew cash by using ATM's when he knew his account truly had no legitimate funds available to honor the checks and withdrawals.

On April 5, 1994, sirens went off as the high volume of activity on the account landed Norton's name on a "suspect kiting report" generated by LaSalle. After LaSalle's audit manager reviewed the report, the bank called Norton and asked him to explain his behavior. Norton agreed there "appeared to be a problem," but offered no real explanation for his activities.

Subsequently, a grand jury indicted Norton for bank fraud under 18 U.S.C. § 1344. Norton moved to dismiss the indictment, arguing that his behavior did not constitute a "scheme to defraud" under the law. Norton attempted to distinguish his activities from an illegal check kiting scheme, which usually involves writing checks back

and forth between accounts at different banks. Norton contended that without a second bank, the first would know the customer's account is overdrawn and would not be tricked into honoring a worthless check. According to Norton, when a bank honors a series of worthless checks from a single account, it is simply extending an overdraft loan. So, Norton was saying, this was a mere civil matter covered by the Uniform Commercial Code; it was nothing to get the feds nipping at his heels.

Norton was unable to cash in on his argument in the district court. The district judge reasoned that Norton's goal was no different from that of a typical check kiter—to trick a bank into thinking he had a higher balance. As a result, the judge found that the indictment properly alleged a violation of § 1344(1) and set the case for trial.

At trial, Norton did not mount much of a defense. He merely opted to cross-examine LaSalle officials about the bank's procedures for honoring overdrafts, approving loans, and extending credit. At closing, Norton argued that LaSalle knew his account was overdrawn and had extended him a loan to cover his overdrafts. The jury didn't buy the argument and found him guilty. Norton then moved for a judgment of acquittal under Rule 29(c). That motion was denied, and Norton eventually was sentenced to a month in prison, 5 months of in-home detention, and 4 years of supervised release. We now consider his appeal.

Norton first challenges the sufficiency of the indictment. Section 1344(1) makes it a felony to knowingly execute a scheme to defraud a financial institution. "Whether a scheme to defraud exists is determined by examining 'whether the scheme demonstrated a departure from fundamental honesty, moral uprightness or fair play and candid dealings in the general life of the community.' " *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992) (quoting *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987)). One such scheme is check kiting. *United States v. LeDonne*, 21 F.3d 1418, 1426 (7th Cir.), *cert. denied*, 115 S. Ct. 584 (1994).

Norton argues, as we said earlier, that check kiting necessarily involves accounts at two different banks. He contends that when only one bank is involved, the decision to honor a check merely constitutes an overdraft loan. In this case, Norton claims that LaSalle "was on notice" that his account was overdrawn.

Judge Bucklo in the district court disagreed and held that the indictment sufficiently alleged that Norton intended to defraud the bank. In response to Norton's loan argument, Judge Bucklo pointed out that the indictment alleged Norton's scheme *prevented* the bank from discovering the account was overdrawn. It followed, then, that the bank did not choose to extend overdraft protection.

Judge Bucklo's opinion hits the nail on the head. While a "traditional" check kiting scheme may involve multiple banks, *see LeDonne*, 21 F.3d at 1425 n.2, § 1344(1) does not simply ban traditional check kiting. Instead, the statute prohibits any "recognizable scheme formed with the intent to defraud." *Id.* at 1425. The broad range of schemes covered by the statute is limited only by a criminal's creativity. In this case, we think the indictment sufficiently alleged that Norton designed a scheme—a version of check kiting where an ATM fills the shoes of a second bank—to "separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against . . . insufficient funds." *United States v. Doherty*, 969 F.2d 425, 428 (7th Cir.), *cert. denied*, 506 U.S. 1002 (1992).

Norton next argues that the district court should have set aside the verdict and entered a judgment of acquittal. We will only disturb a jury verdict, however, "when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Theodosopoulos*, 48 F.3d 1438, 1444 (7th Cir.) (quotations omitted), *cert. denied sub nom.*, 116 S. Ct. 191 (1995). This argument, like Norton's opener, goes nowhere.

The jury here was free to accept or reject Norton's loan defense, and the verdict which rejected it is clearly supported by the evidence. First, LaSalle's records show that between December 23, 1993, and April 1994 Norton's account ranged from a falsely inflated low of $10,791 to a falsely inflated high of $62,621. The jury could certainly have inferred from these records that Norton's actions prevented LaSalle from discovering the account's actual balance. Second, the trial testimony made clear that even though a LaSalle-owned ATM was located less than a block from his office, Norton always deposited his checks at a non-LaSalle ATM which was further away. The jury also heard evidence that a non-LaSalle ATM was needed to carry out the scam (otherwise the checks would reach LaSalle too quickly). Given these facts, the jury could have reasonably concluded that Norton's decision to use a non-LaSalle ATM signaled his intent to defraud LaSalle. Finally, if Norton really thought LaSalle was extending him an overdraft loan, why didn't he stop after the first "loan" in December 1993? The jury was obviously entitled to conclude that Norton's 79 transactions revealed his intent to trick LaSalle into honoring his worthless checks. The judgment below is, therefore, AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Case No. 95 CR 583
LAWRENCE W. NORTON, Defendant.	)	

MEMORANDUM OPINION AND ORDER

The defendant, Lawrence Norton, has filed a motion to dismiss the indictment against him, arguing that it fails to state an offense under 18 U.S.C. § 1344. The United States does not argue that the indictment alleges actionable conduct under 18 U.S.C. § 1344(2) but contends that it sufficiently charges an offense under 18 U.S.C. § 1344(1). Section 1344 is to be broadly construed. *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992). To convict under subsection (1), it is necessary to prove a "recognizable scheme formed with the intent to defraud a financial institution." *United States v. LeDonne*, 21 F.3d 1418, 1425 (7th Cir. 1994), *cert denied sub nom LeDonne v. United States*, 115 S.Ct. 584 (1994). A scheme to defraud "'demonstrate[s] a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community.'" *United States v. Hammen, supra*, 977 F.2d at 383, quoting from *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987).

The indictment states that the defendant schemed to defraud LaSalle National Bank ("LaSalle" or the "Bank") by writing checks payable to himself from his LaSalle account knowing that he had insufficient funds to pay the amount of the checks. After the defendant deposited a check into an ATM machine owned by First American Bank, his LaSalle account reflected the amount of the deposit even though the check would not arrive at LaSalle for payment for several days. To conceal from LaSalle that he was overdrawing his account, the defendant continuously deposited

checks (not supported by adequate funds) drawn on his LaSalle account into the ATM machine.

The defendant agrees that check-kiting schemes involving accounts at two banks have been held to violate § 1344(1). *See Williams v. United States*, 458 U.S. 279 (1982); *United States v. Doherty*, 969 F.2d 425, 428 (7th Cir. 1992), *cert. denied sub nom Doherty v. United States*, 113 S. Ct. 607 (1992). The defendant emphasizes that the *Williams* Court noted that when the check-kiter deposits a check drawn on Bank A into Bank B, the check is not supported by sufficient funds at Bank A; however, because Bank B is unaware of this fact, it gives the check-kiter immediate credit on his account at Bank B. *Id.*

The defendant argues that he cannot be convicted of defrauding the Bank as the Bank "was on notice" when it accepted his checks because its records indicated the defendant was writing checks to himself from an account that had insufficient funds to pay the checks. The indictment reads differently: it alleges that by consistently depositing worthless checks into his LaSalle account, "defendant caused the records of LaSalle to falsely reflect that he had a credit in his account that was sufficient to cover the amount of the previously deposited check." Indictment ¶4, p.2. Thus, the indictment implies that LaSalle Bank was not aware that the defendant's account contained insufficient funds to support his checks and, therefore, this case resembles *Williams*. The defendant cites no cases indicating that even if LaSalle was not actually aware that his account was overdrawn, it should be charged with knowledge and such knowledge would prevent him from being indicted for violating § 1344.

The defendant's argument is further flawed because the aim of the statute is "to punish the scheme to defraud...." *United States v. LeDonne, supra*, 21 F.3d at 1426 (citations omitted). Accordingly, "[w]hat is relevant is whether the defendant 'knowingly execute[d], or attempt[ed] to execute, a scheme or artifice...' to defraud the bank...." *United States v.* Allender, 62 F.3d 909, 915 (7th Cir. 1995).

I agree with the United States that the label attached to the defendant's conduct is not determinative. *See* Response Memo., p.5 n.2. If the government's allegations are true, the defendant's goal apparently was identical to that of an individual using a check-kiting scheme involving accounts at different banks. Just as the check-kiter, the defendant acquired "an interest-free loan for an extended period of time...[by taking] advantage of the several-day period required for the transmittal, processing, and payment of checks....." *Id.* The indictment states that the defendant manipulated his account at LaSalle so that it would appear that the account contained more funds that [sic] it actually did. Thus, the defendant devised a "plan...to separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against accounts with insufficient funds." *United States v. Doherty, supra*, 969 F.2d at 428 (citing *Williams v. United States, supra*, 458 U.S. at 281 n.1).

Finally, *United States v. Orr*, 932 F.2d 330 (4th Cir. 1991), is distinguishable from the instant case. In *Orr*, the defendant opened a checking account using a false name and then proceeded to draw the account down to a negative balance and write five bad checks to merchants for various items. *Id* at 331. The bank did not honor the checks and therefore suffered no loss. The court concluded that § 1344 was not a general "bad check law." *Id.* at 332. In that case, however, the defendant did not artificially inflate his account balance.

In conclusion, the indictment in this case sufficiently alleges a scheme to defraud under 18 U.S.C. § 1344(1). Defendant's motion to dismiss is therefore denied.

ENTER ORDER:

Elaine E. Bucklo, United States District Judge

Dated: December 5, 1995

5/4–302. Payor bank's responsibility for late return of item

§ 4–302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) a demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) is subject to defenses based on breach of a presentment warranty (Section 4–208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

Laws 1961, p. 2101, § 4–302. Amended by P.A. 87–582, § 1, eff. Jan. 1, 1992; P.A. 87–1135, § 1, eff. Sept. 17, 1992.

Formerly Ill.Rev.Stat.1991, ch. 26, ¶ 4–302.

5/3–104. Negotiable instrument

§ 3–104. Negotiable instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of any obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft", a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order".

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

Laws 1961, p. 2101, § 3–104. Amended by P.A. 87–582, § 1, eff. Jan. 1, 1992; P.A. 87–1135, § 1, eff. Sept. 17, 1992.

Formerly Ill.Rev.Stat.1991, ch. 26, ¶ 3–104.